Supreme Court, U.S.
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No. 95-1868

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SHIRLEY THOMPSON, Administratrix of the Estates of Michael Tabor and Brett Tabor; PATRICIA TABOR, Individually, and as parent for Joshua Tabor,

Petitioners,

vs.

BIC CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit departed from the accepted and usual course of judicial proceedings in affirming the District Court's Order in a diversity case granting summary judgment in favor of a defendant on the basis that there was insufficient circumstantial evidence for a jury to decide the issues of negligence and causation.

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STATEMENT OF THE CASE

This case arises out of a house fire which occurred on May 3, 1991 at 709 Lexington Avenue, Altoona, Pennsylvania. In that fire, minor petitioner, Michael Tabor and Brett Tabor, died, and petitioner, Patricia Tabor, and minor petitioner, Joshua Tabor, were injured. On April 21, 1993, petitioners, Shirley Thompson, administratrix of the estates of Michael Tabor and Brett Tabor, and Patricia Tabor, individually and as parent for Joshua Tabor, filed a Complaint against respondent, BIC Corporation, alleging that respondent was liable to them for damages arising from the fire because of respondent's negligence. There was no claim for strict liability. According to petitioners, respondent was not reasonably careful in the testing, manufacture, design and marketing of its disposable butane lighter. The lighter allegedly lacked features to make it "child-proof," even though respondent knew or should have known that the lighter

could have been ignited by a child three years of age or under.

Respondent filed an Answer to petitioners' Complaint denying any negligence or any liability. After discovery, respondent filed a Motion for Summary Judgment on the basis that, as a matter of law, it could not be liable pursuant to Pennsylvania product liability law and that, as a matter of law, the evidence was insufficient to establish respondent's liability for negligence.

Respondent's Motion for Summary Judgment was referred to a Magistrate Judge in accordance with the Magistrate Act, 28 U.S.C. §636(d)(1) and subsections 3 and 4 of Local Rule 72.1 for Magistrate Judges. The Magistrate Judge filed a Report and Recommendations on March 6, 1995 which recommended that respondent's Motion for Summary Judgment be granted. The Report and Recommendation rejected respondent's argument that it could not be liable under Pennsylvania product liability

law, but the Report and Recommendation accepted the argument that, as a matter of law, there was insufficient evidence of respondent's liability for negligence.

Respondent filed objections on March 16, 1995 to the portion of the Report and Recommendations which rejected respondent's argument that it could not be liable under Pennsylvania products liability law. Petitioners filed objections on March 17, 1995 to the portion of the Report and Recommendations which found that summary judgment should be entered, because there was insufficient evidence of negligence. On March 20, 1995, the Magistrate Judge issued a Memorandum in response to plaintiffs' objections. On March 29, 1995, the District Court adopted the Report and Recommendations of the Magistrate Judge and entered a Memorandum Order, granting summary judgment in favor of respondent.

Petitioners filed a Notice of Appeal with the United States Court of Appeals for the Third Circuit. After the

parties filed Briefs, the Third Circuit Court affirmed the District Court's decision. Petitioners then filed a Petition for Writ of Certiorari with this Honorable Court, and respondent files its Brief in Opposition.

REASONS FOR DENYING THE WRIT

Supreme Court Rule 10 identifies a number of reasons that this Honorable Court may consider in deciding whether the reasons offered by petitioners are compelling enough to grant a Writ of Certiorari. Several of these reasons concern federal questions. Petitioners attempt to invoke Rule 10 by presenting a Question about whether the federal courts deprived petitioners of their "civil rights." However, a review of the Opinions of the Federal Magistrate, the District Court and the United States Court of Appeals for the Third Circuit shows that no federal question is at issue. The courts below ruled on a straightforward question of whether summary judgment was appropriate, i.e., whether there were genuine issues of

material fact and whether respondent was entitled to a judgment as a matter of law on the issues of negligence and causation. The Magistrate reviewed the record and the Briefs of the parties and decided that there were no genuine issues of material fact and that respondent was entitled to judgment as a matter of law. The District Court agreed with the Magistrate. The Third Circuit Court, applying a plenary standard of review, affirmed the District Court's decision. Therefore, the Question Presented by petitioners is an inaccurate statement of what transpired in the courts below, and the courts did not deprive petitioners of their civil rights as alleged by petitioners.

The second part of the Question Presented by Petitioners is likewise a misstatement of the proceedings below. Although petitioners allege that the courts below applied a "standard of review which has been proscribed by the Pennsylvania Supreme Court," the courts below

correctly followed Pennsylvania law reaching their decisions.

According to petitioners, the courts below reached their decision in violation of Smith vs. Bell Telephone Company of Pennsylvania, 397 Pa. 134, 153 A.2d 477 (1959), the case that established the long standing rule of Pennsylvania that a plaintiff's case may be established by circumstantial evidence and that circumstantial evidence need not be so strong as to eliminate all other inferences. However, contrary to petitioners' implications, the Smith case did not state that any circumstantial evidence which raises possibilities can reach a jury. Instead, the Smith court emphasized the rule that "the jury may not be permitted to reach its verdict merely on the basis of speculation or conjuncture, but that there must be evidence upon logically its conclusion may be based." 397 Pa. at 138. The Smith case stated further:

> Therefore, when a party that has the burden of proof relies upon circumstantial evidence

> and inferences reasonably deducible therefrom, such evidence, in order to prevail, must be adequate to establish the conclusion sought and must so preponderate in favor of that conclusion so as to outweigh in the mind of the fact-finder any other evidence and reasonable inferences therefrom which are inconsistent therewith.

397 Pa. at 139.

Neither respondent nor the courts below disagree that the ruling of the Smith case applied to the present case. Indeed, the Opinions attached to petitioners' Petition that the courts below carefully examined the circumstantial evidence to determine if it could serve as a basis for legitimate inferences by a jury, rather than a basis for speculation or guess. What the courts below found was that, when viewed in the most favorable light, petitioners' evidence established only that a fire ignited by an open flame occurred while 2-year-old boy and 6-year old boy were unsupervised in a house where there were matches and different brands of lighters present. As a matter of law, such evidence was insufficient to prove negligence

and causation.

Petitioners' representations in their Statement of Case do not change this conclusion. Petitioners characterize the testimony of petitioner, Patricia Tabor, as stating that she had been awake in the room for 20 minutes before the fire started. However, whether Ms. Tabor could be characterized as asleep or awake or dozing during the time the fire began, what was undeniable was that Ms. Tabor did not see the fire begin. She did not observe the fire until after the couch was already burning, and she did not observe her 2-year-old son until he was standing beside her. Therefore, her testimony provided no basis for a legitimate inference. Nor did the testimony of Pennsylvania State Trooper James Behe. Petitioners claimed in their Statement of the Case that Pennsylvania State Trooper James Behe concluded that a lighter, not matches was used to start the fire. However, petitioners neglected to mention that Trooper Behe also testified about

his other theory that the 6-year-old boy had started the fire. More importantly, the Trooper's official conclusion was that the fire was "of unknown origin." Given the lack of evidence, the courts below recognized that a jury could fare no better than the State Trooper in determining the origin of the fire.

Furthermore, petitioners' argument that the Smith case was not followed because there were "inferences" which were "equally possible" mischaracterizes the decisions of the courts below. The essential point of those decisions was that there was insufficient evidence to allow any inferences at all. The courts below correctly concluded that the evidence available did not permit a jury to infer that the 2-year-old boy started the fire with a BIC lighter and would only permit a jury to make guesses. To allow a jury to speculate on such evidence would have been contrary to the rule of the Pennsylvania Supreme Court in the Smith case, and the courts below correctly

declined to allow the speculation.

The Third Circuit Court succinctly stated the conclusion reached by the courts below:

> We agree that there is simply no adequate evidence to establish who started the fire and by what means. Plaintiffs' theory is pure speculation as to know how this tragedy occurred, and is insufficient basis to submit the case to the jury.

In reaching that conclusion, the courts below correctly followed federal procedures and correctly applied Pennsylvania substantive law. This case presents no issue of federal law and no occasion on which this Court should exercise its supervisory power. The courts below clearly did not depart from "the usual course of judicial proceedings." Supreme Court Rule 10 states that a petition for a writ of certiorari will be granted only for "compelling reasons." Petitioners have provided no such reasons here.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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